## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: May 10, 2000

TO : James S. Scott, Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Hacienda Rehabilitation and Health Care

Center, Inc.

Cases 32-CA-17775 and 32-CA-17812

530-6067-6067-3400 530-6067-6067-5200 530-6067-6067-7100 530-6067-6067-8000 530-6067-6067-8150

This case was submitted for advice as to: 1) whether complaint should be authorized on the Employer's unilateral cessation of dues checkoff after expiration of the collective-bargaining agreement, currently lawful under <a href="Bethlehem Steel">Bethlehem Steel</a>, 136 NLRB 1500 (1962); and 2) whether complaint should be authorized on the Employer's refusal to provide witness statements in a grievance proceeding under Anheuser-Busch, 237 NLRB 982 (1978).

## FACTS

#### A. Checkoff

The parties have had a collective-bargaining relationship for over 25 years. Sometime in 1999 a new manager, Rex Moore, took over the operation of the Employer's Fresno facility. The collective-bargaining agreement was to expire on December 31, 1999. In September 1999, the Union sent an information request to the Employer to prepare for contract negotiations. The Employer provided most of the information requested by the Union on November 15. The parties met for negotiations on December 7 and December 16. Prior to the December 31 expiration of the contract, the Employer posted the new wage rates it was offering to the employees. When employees received their paychecks for the first pay period in January 2000, they contained notes from the Employer indicating that they had

been given a 30-cent wage increase and that the Employer had ceased deducting Union dues from their paychecks.

Section 2 of the expired collective-bargaining agreement establishes a lawful union shop. Section 3 (Voluntary Written Assignment of Wages) contains the following language:

During the term of the Agreement, the Employer will honor voluntarily written assignments of wages to the Union for payment of Union initiation fees and dues, provided such assignments are submitted in a form agreed to by the Employer and the Union.

The check-off authorization form does not have any language limiting the authorization to the life of the contract.

### B. Information Request

[FOIA Exemptions 6 and 7(C)

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On October 15, 1999, Union Field Representative Ninfa Franco sent a letter to Rex Moore, Administrator of the Employer's facility, requesting information which the letter stated was absolutely necessary, relevant and critical to the Union in its defense of [FOIA Exemptions 6 and 7(C) .] The letter requested, inter alia, any and all records, statements and/or documentation that the Employer relied upon to support its decision to [FOIA Exemptions 6 and 7(C).] The Union did not make a specific

request for the names of any witnesses. Wimberly responded by saying that she had already sent most of the information that the Union was requesting, but would not provide the records, statements and documentation relied upon to support the Employer's decision at this time.

Franco denies that the Employer had already sent the information requested involving previous incidents and discipline. The Region has found the Employer's failure to provide this information to be a violation of Section 8(a)(5). It was covered in a recently approved informal settlement agreement.

According to the Employer, because of the seriousness of the offense resulting in the [FOIA Exemptions 6 and 7(C)], the Employer was not at liberty to reveal its sources until the Department of Health Services had done an investigation. The Employer asserts that under the collective-bargaining agreement and the law, witness statements do not have be rendered until steps 1 and 2 of the grievance procedure have been exhausted and the grievance is moved to

#### ACTION

arbitration. The Employer has not asserted that any witnesses were given assurances of confidentiality.

We conclude that the Employer violated Section 8(a)(5) by: ceasing to honor checkoff authorizations because the checkoff authorizations survived the expiration of the contract and none of the employees attempted to revoke their authorization; and assuming there is no language in the contract waiving the Union's right to the requested information, refusing to provide the Union with relevant, nonconfidential information.

When a collective-bargaining agreement expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations.<sup>2</sup> In Bethlehem Steel,<sup>3</sup> the Board held that

 $<sup>^{1}</sup>$  It is not clear if and when the Department of Health Services ever did an investigation of this matter. According to the Union, the Department of Health Services does an investigation when there are allegations of patient abuse that might result in the loss of a [FOIA Exemptions 6 and 7(C) .]

the employer did not violate Section 8(a)(5) by ceasing to honor dues checkoff authorizations after collective-bargaining agreements expired. The Board noted that the union-security requirement had expired with the contracts and then tied the checkoff authorizations to union security. The Board then concluded, at 1502, "when the contracts terminated, the [r]espondent was free of its checkoff obligations to the [u]nion."

Contrary to <u>Bethlehem Steel</u> and its progeny, the General Counsel has recently taken the position that, after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed. <sup>4</sup> Thus, where checkoff authorizations do not limit their application and duration to the union security-requirement and where employees did not seek to revoke their authorizations, an employer should not presume that the authorizations have expired with the expiration of the collective-bargaining agreement.

A Section 8(a)(5) complaint is warranted in the instant case consistent with the  $\underbrace{\text{Hillhaven}}_{\text{Hillhaven}}$  analysis. The checkoff authorization signed by the employees in this case did not indicate that it would automatically become ineffective upon contract expiration. And there is no evidence that any of the employees revoked their checkoff authorizations.

As to the Union's information request, the Region should investigate whether the contract has language which would constitute a waiver of the Union's right to the information, as the Employer asserts. Assuming no waiver, we initially conclude that the issue of whether the Employer is required to supply the witness statements

Laborers Fund v. Advanced Lightweight Concrete, 484 U.S.
539 fn.6 (1988); NLRB v. Katz, 369 U.S. 736 (1962); Bottom
Line Enterprises, 302 NLRB 373, 374 (1991).

<sup>&</sup>lt;sup>3</sup> 136 NLRB 1500 (1962), enf. denied on other grounds, 320 F.2d 615 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964). See, e.g., Peerless Roofing Co., 247 NLRB 500, 505 (1980) (an employer does not violate the Act by failing to deduct union dues in the absence of a current collective-bargaining agreement requiring it to do so).

<sup>&</sup>lt;sup>4</sup> See <u>Hillhaven Corp.,</u> Case 20-CA-26687, General Counsel's Appeal Minute, dated December 7, 1995.

should be analyzed by applying the Supreme Court's decision in <a href="Detroit Edison">Detroit Edison</a><sup>5</sup> rather than the Board's rationale in <a href="Anheuser-Busch">Anheuser-Busch</a>. In <a href="Ormet Aluminum Mill Products Corp.">Ormet Aluminum Mill Products Corp.</a>, <sup>6</sup> the General Counsel urged the Board to abandon the <a href="Anheuser-Busch">Anheuser-Busch</a> per se approach to prearbitration disclosure of witness statements, and instead to apply the <a href="Detroit Edison">Detroit</a> <a href="Edison">Edison</a> balancing test that the Board applies to all other categories of alleged confidential information.

Applying a <u>Detroit Edison</u> analysis to the instant case, we note initially that the witness statements requested by the Union are relevant. And, the Employer does not contend that the information is confidential. Rather, the Employer asserts that it was not at liberty to reveal its sources until the Department of Health Services had done an investigation, since to do so might jeopardize that investigation. We note, however, that the Union has not asked for the names of witnesses. Thus, it would not appear that simultaneous investigation by the state and the Union would prevent both from obtaining the necessary information. Accordingly, on the present record the Employer has not established a confidentiality defense.

Even assuming, arguendo, that the Employer had established a reasonable and substantial business justification, it has not bargained with the Union about a reasonable, good faith accommodation in lieu of providing the actual witness statements. The Employer simply denied the Union's request for the witness statements without bargaining. Therefore, the Employer did not meet its obligations under Detroit Edison.

Further, the Employer has failed to turn over summaries of the witness statements, which, even under Anheuser-Busch, it is required to do.<sup>7</sup>

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by ceasing to honor checkoff and, assuming no waiver, by refusing to provide the Union with relevant, nonconfidential information.

<sup>&</sup>lt;sup>5</sup> <u>Detroit Edison Co. v. NLRB</u>, 440 U.S. 301 (1979).

 $<sup>^{6}</sup>$  Case 8-CA-29061, Advice Memorandum dated September 5, 1997.

<sup>7</sup> Accord: Pennsylvania Power Co., 301 NLRB 1104, 1107 (1991).

B.J.K.